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Supreme Court of the United States

October Term, 1974
No. 74-917

CLAIM OF CHESTER E. GORDON, Administrator of the Estate of Arthur I. Crawley, Deceased,
Petitioner,

vs.

DOROTHY M. DAHL, Widow, Administratrix of the Estate of George M. Dahl, Deceased, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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To the United States Court of Appeals
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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Chester E. Gordon, Administrator of the estate of Arthur I. Crawley, deceased, prays that the Court issue its writ of certiorari to the United States Court Of Appeals for the Sixth Circuit to review the judgment in case No. 73-1350 on the docket of that court.

OPINIONS BELOW

The opinion of the District Court is reported as: *In re Cambria Steamship Company*, 353 F. Supp. 691 (1973). It is set forth herein in the Appendix (App. 23). The opinion of the Court Of Appeals is captioned: "Claim Of Chester E. Gordon, Administrator Of The Estate Of Arthur I. Crawley, Deceased, Appellant v. Dorothy M. Dahl, Widow, Administratrix Of The Estate Of George M. Dahl, Deceased, Appellee 73-1350". It is set forth herein in the Appendix (App. 39). This opinion is unreported.

JURISDICTION

The judgment in question is dated, decided and filed, by the Court Of Appeals, as of October 30, 1974. No petition for rehearing was filed (App. 53).

This Court has jurisdiction to review under 28 U.S.C. 1254(1), within the ninety days fixed by 28 U.S.C. 2101 (c).

QUESTION PRESENTED FOR REVIEW

Is proof of financial dependency—as "borrowed" by the District Court, from the Death On The High Seas Act—a prerequisite element to any recovery by the estate of Arthur I. Crawley, Master of the S.S. Daniel J. Morrell, for his wrongful death, at the age of forty-seven years, caused by the unseaworthiness of the vessel, in a major maritime disaster,—his sole surviving next of kin being two brothers and four sisters, when,—

(a)

The District Court found from the evidence, and adjudged, that decedent's estate established a pecuniary loss of prospective accumulations, from decedent's earnings (as discounted to present worth) in the sum of $239,189.59; and further found that,—

(b)

"Captain Crawley had a substantial income and placed a large portion of this income into savings each year. It is likely that if he had survived to a normal retirement age, he would have left a substantial estate to these relatives"; (App. 33) but,—

(c)

Since the family relationship was that of brothers and sisters, and, since each was then self-supporting, there could be no recovery for want of proof of dependency.

The District Court denied any recovery to the estate of the decedent.

The Court Of Appeals affirmed on grounds set forth in its opinion.

STATUTES INVOLVED

Resolution of the single question of law presented for review—there being no controversy as to the relevant facts—turns on the construction and the application of the new, nonstatutory right to recover damages, for the wrongful death of a seaman worker, caused by the unseaworthiness of the vessel furnished to him by the vessel owner,

as the law applicable thereto, has been judicially decided by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974).

No statutes are directly involved.

STATEMENT OF THE CASE

The proceedings in the District Court and the relevant facts in the record are accurately and concisely set forth in the opinion of the Court Of Appeals and we adopt them, as follows:

> "In *Moragne v. States Marine Lines,* 398 U.S. 375 (1970), the Supreme Court overruled *The Harrisburg,* 119 U.S. 199 (1886) to create for the first time a non-statutory cause of action for wrongful death based upon unseaworthiness. *Moragne* deliberately left the shaping of the new action to 'further sifting through the lower courts in future litigation'. 398 U.S. at 408. Specifically, the Court in *Moragne* left unanswered the question of who were to be the beneficiaries of the newly created maritime right and what elements of damages were to be recoverable, but suggested that the court would not be without 'persuasive analogy' in the general maritime law as well as state and federal wrongful death acts, as they endeavored to resolve the 'subsidiary issues' left open by *Moragne.* We consider two of those issues in these consolidated appeals.
>
> * * * * *
>
> In the appeal of Crawley's Estate, as represented by appellant Gordon, administrator of that estate, we

consider whether the wrongful death action created by *Moragne* should be an action for 'loss to the estate' of the deceased, measured by the amount the deceased would have accumulated, out of his earnings during the period by which his life expectancy was shortened, and recoverable irrespective of whether the decedent is survived by next of kin or other beneficiaries.

The district court below disallowed *both* Gordon's and Rischmiller's claims. *In re Cambria Steamship Company*, 353 F. Supp. 691 (1973). We affirm.

On November 29, 1966, the S.S. Daniel J. Morrell, a Great Lakes bulk cargo carrier, broke in two and sank in Lake Huron within the coastal waters of the State of Michigan. Among the twenty-eight men who perished in the disaster were Arthur I. Crawley, Captain of the Morrell, and Henry Rischmiller, a crew member.

Following the loss, the owners of the ship brought an action for exoneration or limitation of liability in the United States District Court for the Northern District of Ohio. After notice, interested claimants filed answers to the complaint alleging that the ship was unseaworthy and also filed individual claims for recovery. The case was eventually settled as to liability and the vessel owners paid into the registry of the court the agreed sum of $2,750,000, out of which all claims were to be paid. Among the claimants were appellant Frederick I. Rischmiller, who made claim for the wrongful death of his brother Henry, and appellant Chester E. Gordon, who, as administrator of the estate of the deceased Captain Crawley, filed a claim on behalf of the latter's estate.

To determine the validity and amount of the several claims, the district court appointed two special masters who thereafter reported their findings to the court, which entered final judgment on February 3, 1973. The judgment included determinations that neither the brother of Rischmiller, nor the administrator of Captain Crawley's estate was entitled to recover damages representing loss of prospective inheritance, or loss to the estate itself.

* * * * *

Arthur I. Crawley was Captain of the Morrell. No claim was established that his conduct in any way contributed to the unseaworthiness or loss of the vessel. Forty-seven years of age at the time of his death, Crawley had never married and he was survived by two brothers and four sisters, all of whom were older than he. One brother died after Crawley's death, leaving children, but none of the brothers or sisters, or their children, were in any way dependent upon Arthur. Captain Crawley's income far exceeded his expenses and, in the ten years prior to his death, his savings had averaged 34.9 per cent of his income. Appellant Chester E. Gordon was appointed administrator of Captain Crawley's intestate estate and made claim in the district court on the theory of a 'loss of estate' due to the wrongful death. The special masters computed such loss, as reduced to present value, at $239,189.59. This last sum, however, they disallowed for the reasons stated in disallowance of the Rischmiller claim, and because Captain Crawley as the youngest in his family, would probably have outlived his brothers and sisters, making the likelihood that they or the children would, in fact, have inherited his estate even more speculative.

While the two appeals proceed upon somewhat different theories, the ultimate recipients of any damages in both would be non-dependent collateral relatives, and the amount recovered would be measured by a reduction to present value of the amount of any accumulation of earnings which would have been added to decedent's estate had he lived out his normal life expectancy.

* * * * *

In our approach to the issues in this case, we believe we should be guided by those general principles which are set forth in *Sea-Land Services v. Gaudet, supra,* as defining the nature of the action and remedy created by *Moragne.*"

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner urges that, the no recovery judgment of the Court of Appeals, here, in disallowing the claim of the Crawley Estate, is erroneous because:

(a)

It misconstrues and misapplies the rationale of the recent, epoch making decisions of this Court in *Moragne* (1970) and in *Sea-Land Services, Inc.* (1974).

(b)

It erred in its resolution of the "subsidiary" issue of beneficiaries and the even remoter subsidiary issue of dependency. In doing so, it gave no effect to the deep,

active, liberal and humanitarian commitments of this Court, whereby in maritime wrongful death cases, caused by a violation of the absolute, non delegable duty of the vessel owner employer, to furnish its officers and crew members with a seaworthy ship, recovery shall be had under the mandates of *The Sea Gull* (1865), the *Moragne* (1970), and *Sea-Land Services, Inc.* (1974), and this, in the absence of any "established and inflexible" rules to the contrary. No established and inflexible rule can be found in the decision of the Court of Appeals.

Discussion of the Concept of Dependency at Common Law

Our first concern is, with recovery of the pecuniary loss for the benefit of decedent's estate at common law and, without reference to the nonstatutory, maritime right, as propounded and decided in *Moragne.*

The right to recover pecuniary loss for the benefit of decedent's estate is summed up in *Death* 25A C.J.S., Section 101 at pages 907, et seq., in a headnote, with citation of decisions from Courts in many jurisdictions. We quote it as follows:

(a) FOR BENEFIT OF ESTATE

"In an action for the benefit of decedent's estate the measure of damages is the pecuniary loss sustained by the estate."

This is amplified in the text as follows:

"In an action for the benefit of decedent's estate, the measure of damages is the pecuniary value of decedent's life to the estate, or, in other words, the economic loss sustained by the estate from the untimely death of decedent. This is the present worth of the

amount, which the estate would probably have received if decedent had lived, taking into consideration such matters as his occupation, earning capacity, age, health, habits as to industry and economy, the amount of his property, and the probable duration of his life, and recognizing that there is normally a decrease in earning with old age, or the amount lost by the total destruction of decedent's earning capacity, and not merely the amount of the probable savings."

As to the foregoing, we say that there was plenary evidence, in the record before the District Court and the Court Of Appeals, as to every item of proof above described, and that it was convincingly established by the evidence, introduced by the Crawley estate. What is more to the point, the amount was adjudicated by the District Court, and accepted by the Court Of Appeals, in the sum of $239,189.59.

Our next concern will be directed to the role of the subsidiary incident of dependency, in a nonstatutory common law action to recover pecuniary losses.—again, without reference to the maritime aspects of the claim.

In *Death* 25A C.J.S., Section 33 (3), at page 649, we find the decisional law summed up in the headnote as follows:

"Dependency of the beneficiary on the decedent for support is essential only where the statute so provides".

Decisions from twelve courts of last resort, including the United States Court Of Appeals for Arkansas, are cited in the text in support of the foregoing headnote.

Before ending the above discussion of the role of dependency in nonmaritime death cases, it is worthy of note

that, in its normal context and application, dependency has its true role in a damage claim for loss of contributions and support by dependents, and not pecuniary loss sustained by next of kin or heirs at law or testamentary beneficiaries.

There can be, and we suggest there is here, confusion resulting in the decision of the lower court where it fails to distinguish dependency, in its relation to the loss of contributions and support, and, dependency in its relation to pecuniary loss to the estate, based on loss of prospective accumulations from earnings.

Recovery Under Moragne

Against the foregoing background of nonmaritime decisional law, in common law actions, we can next turn to the separate, special aspect of the Crawley claim, which seeks recovery under the common law of the sea, or as it is usually called, the General Maritime Law of the United States, and this, as propunded and decided by this Court.

In *The Sea Gull,* Chief Justice Chase wrote, in 1865, as follows, as quoted in *Moragne,* at 387:

> "There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures . . . and certainly *it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.*" Id. at 910. (Emphasis added.)

We say, with great respect, that the judgment of the Court of Appeals here is totally devoid of any elucidation, which could be described as meeting the requirement of "established and inflexible rules".

This Court, in 1974, in *Sea-Land Services, Inc.*, 414 U.S. at page 583, reaffirmed the critical importance of the foregoing rationale in *The Sea Gull* and *Moragne*, where it upheld the right to recover the nonpecuniary item of "loss of society", in a maritime wrongful death case.

Again, in *Sea Land Services, Inc.*, at page 587, this Court, speaking through Mr. Justice Brennan for the majority, said, in respect of the recovery for nonpecuniary loss of society:

> "A clear majority of the States, on the other hand, have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society. **Thus our decision to permit recovery for loss of society aligns the wrongful death remedy with a majority of state wrongful death statutes. *But, in any event,* our decision is *compelled*, if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." n. 23. (Emphasis added.)

Discussion of the Reasons Found in the Decision of the Court of Appeals in Disallowing the Crawley Claim

Decedents Leaving No Survivors or Next of Kin

At the bottom of page 8 of the opinion, the Court, speaking to the loss to the estate theory on which recovery is here sought, said (App. 47):

> "We reject this view, however, because it has commended itself to so few other jurisdictions, and be-

cause its fundamental punitive approach is inconsistent with the expressed compensatory philosophy of the maritime law".

Our quotations from *Death* 25A C.J.S., and the citations found in support of the text are, we believe, an adequate response to alleged lack of decisional law.

Punitive Approach

The reference to "punitive approach" at page 8 is unclear at best and, thus, difficult to answer. The Court Of Appeals apparently had in mind that it would be punitive in its result to pay damages to the "inanimate estate" of a decedent who suffered wrongful death, but, *left no survivors or next of kin* (App. 47, 49).

That, of course, is not the factual situation of the Crawley family. The record here shows that Captain Crawley, unmarried and without children, made his home with his father and mother until both died. Thereafter, at the time of his death at forty-seven years of age, he was making his home with a widow sister and a widower brother. There was therefore a very close, harmonious, family unit of those closest to him at death.

It is thus hard to perceive any basis for a punitive factor in the Crawley Estate claim. If solicitude by the lower Court for the wrongdoer vessel owner is involved, as in situations where there are no surviving next of kin, then the denial of recovery to the estate of the decedent Crawley here is itself a punitive result for one who chose to remain single and thus die with no surviving widow, children or parents but with six surviving brothers and sisters.

Paucity of Decisional Law

It is again stated at page 11 of the opinion of the Court of Appeals that:

"We have, in fact, been shown no case in which a non-dependent collateral relative was awarded damages for his loss." (App. 50.)

In response to this, it is important to recall that *Moragne* was decided in 1970 and *Sea-Land Services, Inc.*, in 1974.

These were the recent, and the first epoch-making decisions by this Court, of a non-statutory right to recover damages for maritime wrongful death, since the contrary holding in *The Harrisburg* in 1886.

When *Sea-Land Services, Inc.*, was decided in the Fifth Circuit,—463 F.2d 1331,—Judge Charles Clark wrote with great perceptivity as follows:

"The albatross inherent in the vagaries and vicissitudes of right and remedy under differing state wrongful statutes has been lifted from the Mariner's neck. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Though the reckoning of the Supreme Court predicts this course will steer the mariner into 'more placid water,' *Moragne* 398 U.S. at 408, *they are waters that remain uncharted. Today we map at least a part of them.*" (Emphasis added.)

In striking contrast to the actual pecuniary loss to the estate of Captain Crawley, the issue before the Fifth Circuit was the nonpecuniary item, for loss of society.

This Court by majority decision, affirmed the "map" as charted by Judge Clark, in respect of recovery for a nonpecuniary loss.

Lack of decisional law in the lower courts is, we believe, no cause for lament in deciding the issue of dependency in the instant case.

Speculative Abstractions Were Weighed Heavily by the Court of Appeals in Support of Its No Recovery Judgment Against the Crawley Estate

At pages 11 and 12 of the opinion of the Court of Appeals, it quotes with approval from the Special Masters' report to the District Court, some speculative abstractions as to possible future events in the Crawley family, had the decedent lived out his life expectancy (App. 51).

The assumptions made are that, had he lived, he might have made an unequal distribution of his estate by will, he might have made gifts to charity, he might not have continued his habit of thrift as evidenced by his savings accounts, and finally, as the youngest of the family, all of the brothers and sisters would probably precede him in death and thus receive no inheritance from him, etc., etc.

All of this is summed up by the Court of Appeals as follows:

> "An even greater uncertainty, however, is whether the particular claimants would ultimately have received any benefit themselves". (App. 51.)

The first response to this is, that all rights and remedies of all parties in interest were vested and became fixed as of the date of decedent's wrongful death. As already stated, each element necessary to establish a claim for loss of inheritance, on the theory of loss to the estate, as set forth in detail in the headnotes and quotation from *Death* 25A Corpus Juris Secundum, were fully supported in the record in the lower courts.

These future forebodings in the two lower courts have, we think, no more relevancy in the Crawley estate claim than the probable remarriage of a widow or the death by

accident or illness of surviving children would have, in a vessel owner's defense against a claim for loss of future contributions and support.

The Court of Appeals' Concern About the Frequent Use of the Word Dependents in Wrongful Death Decisions

The Court of Appeals attached special significance to the frequent use of the word "dependents" in the *Moragne* and *Sea-Land Services* decisions.

In each of the cases, the beneficiaries were widows, etc. and dependency was presumed as a matter of law. It was therefore accurate to equate dependent with benefici- and *Sea-Land Services* decisions (App. 48).

Here in *Crawley*, the word dependency is not used in the sense of contributions and support, as claimed by dependents for that pecuniary loss. The claim of Petitioner is for pecuniary loss to the estate of decedent, as a result of the wrongful deprivations to the estate of a maritime worker, with very high earning capacity and a unique motivation and ability to add accumulations to his estate, as found in his savings accounts in banks.

CONSIDERATIONS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This case presents the kind of problem which the Court should review and settle, because:

1.

In *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), this Court, by a unanimous, history making decision, created for the first time, a nonstatutory maritime cause of action, for wrongful death, due to the violation

of the vessel owner employer's duty, to furnish its seamen employees, with a seaworthy vessel.

Mr. Justice Harlan, writing for the Court, explicitly left the shaping of the new nonstatutory action—in respect of subsidiary issues, such as beneficiaries and damages—to "further sifting through the lower courts in future litigation." 398 U.S., at 408.

Here the Court of Appeals rendered a decision, which, for the reasons hereinbefore set forth, is in conflict with the prior decision of this Court in *Moragne*.

2.

The Sea-Land Services' decision, 414 U.S. 573 (1974), was concerned with recovery for an item of nonpecuniary loss; to wit, loss of society, under *Moragne*. Recovery was granted by decision of the majority members of this Court. The dissent appears to have been focused on the nonpecuniary character of the damage claim.

The instant case, however, is concerned with the pecuniary loss that was sustained by the estate of Captain Crawley. The precise amount of the loss was adjudicated in the District Court and accepted as proven by the Court of Appeals.

Therefore, there is strong reason to support the position of Petitioner, that the Court of Appeals, in its no recovery decision, established a rule in conflict with the recent decision of this Court in *Sea-Land Services, Inc. v. Gaudet*.

3.

There exists great uncertainty in the lower federal maritime courts, in resolving subsidiary questions of beneficiaries and damages, under *Moragne*.

What Judge Charles Clark wrote for the Fifth Circuit, prior to the grant of certiorari, as hereinbefore quoted, in the *Sea-Land Services, Inc.* case, is ample support for the above statement, as to the maritime judiciary.

Great uncertainty, likewise, exists among maritime lawyers, who must advise clients in respect of rights and remedies, relevant to the subsidiary issues above named.

Speiser's treatise on RECOVERY FOR WRONGFUL DEATH (1966) has been cited by this Court, with approval, in both *Moragne* and *Sea-Land Services.*

In the 1974 Supplement, recently published, Speiser has prepared a "New Text", entitled, THE MODERN ADMIRALTY RULE. At page 6 he first describes the *Moragne* decision as:

> "probably the most important wrongful death case holding in the entire history of American jurisprudence—perhaps in all Anglo-American jurisprudence".

Speiser next proceeds to give a special caveat to maritime lawyers, as follows, in reference to *Moragne,* and to the unsettled subsidiary questions thereunder:

> "This requires attorneys, confronted with maritime deaths, not governed by the Death On The High Seas Act, or the Suits In Admiralty Act, or by the Jones Act, to reexamine and reevaluate any and all prior decisions, federal court at any level, or state court, that have dealt with maritime deaths."

The foregoing state of the general maritime law of the United States, in the construction and the application of the *Moragne* rationale, furnishes, we submit, cogent and urgent support, for allowance of the Crawley Estate petition for a writ.

4.

After *Moragne*, but prior to *Sea-Land Services*, the Sixth Circuit Court of Appeals was concerned with the allowance or disallowance of a nonpecuniary item of wrongful death damage. The decision referred to is *Petition of United States Steel Corporation*, 436 F.2d 1256 (1970). The judgment was—no recovery.

That decision was apparently urged as a precedent for "no recovery," when *Sea-Land Services, Inc.* was argued before this Court. The disapproval of this Court was set forth in footnote No. 23, at page 588.

Therefore, we have a situation in the Sixth Circuit, wherein *two* decisions have been rendered by the Court: one, disallowing nonpecuniary damage, and the second, in *Crawley*, disallowing pecuniary damages.

We believe this makes review and settlement, by this Court, of the Crawley Estate claim, of prime importance, less backward steps in the direction of *The Harrisburg* proceed any further.

CONCLUSION

Strong reasons thus exist for allowing the Writ sought by Petitioner, to the end that, this Court review and settle, the broad, open question as to the identity and the inter priority status of beneficiaries under *Moragne;* and, in doing so, to review and settle the critical question here—as to whether proof of dependency is a precondition to any recovery by the estate of Captain Arthur I. Crawley, for the heavy pecuniary loss both lower courts have adjudged to have been sustained by the estate, and this, for

the benefit of his six brothers and sisters, the closest and the sole surviving members in the Crawley family unit, at the time of his wrongful death.

The decision of the lower Court, if permitted to stand, is freighted with melancholy consequences for seamen victims in maritime disasters. It establishes a nonliberal, nonhumanitarian, no-recovery rule for maritime wrongful death for the Great Lakes, the Mississippi and the Ohio rivers, and for the other navigable waters within the Circuit. It raises a seiche that will be felt through all admiralty jurisdiction, and beyond the confines of the Sixth Circuit.

The writ should issue.

The decision below should be reviewed and reversed.

And, since all questions of fact and law—save the one of law before this Court—are undisputed, including the precise amount of the pecuniary loss, it is submitted that, in the discretion of the Court, the order of reversal may direct that final judgment be entered in favor of Petitioner, the Crawley Estate.

Respectfully submitted,

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APPENDIX

PRETRIAL MEMORANDUM OF DISTRICT COURT

(Filed December 22, 1970)

Civil No. C67-61

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In the Matter of the Complaint of CAMBRIA STEAMSHIP COMPANY, a corporation, as owner, and Bethlehem Steel Corporation, as Demise Charter in Possession and Operation of the STEAMER DANIEL J. MORRELL, Her Engines, etc. for Exoneration From or Limitation of Liability.

MEMORANDUM OPINION AND ORDER ON PRETRIAL HEARING OF DECEMBER 7, 1970

BATTISTI, *C.J.*

This cause came on for pretrial hearing on the 7th day of December, 1970.

It appears that counsel representing all claimants, and the complainant for limitation or exoneration, Bethlehem Steel Corporation, were present;

That upon the representations of J. Harold Traverse, the estate of the claimant John H. Schmidt is represented by Abraham E. Freedman;

That J. Harold Traverse, upon his representation, had full power and authority to represent the claim of the said claimant, the estate of John H. Schmidt, at the pretrial hearing;

That upon the representations made by all other counsel that they had full power and authority to represent all other claimants;

That following extended conferences with complainant's counsel and counsel for the claimants that Bethlehem Steel Corporation would recommend, and that counsel for all claimants would accept a lump sum settlement, excluding the claim of the sole survivor, in the sum of $2,750,000.00 to be apportioned and awarded among the claimants by a special master or special masters appointed by this Court;

That the complainant, Bethlehem Steel Corporation, has accepted and approved the recommendation of its counsel;

And that the sole survivor claimant, Hale, by his counsel, has represented that he will undertake separate negotiations with the complainants and, failing settlement, will submit his claim for determination by the special master or special masters.

NOW, THEREFORE, IT IS ORDERED THAT:

1. This cause is entered as "settled," but entry of dismissal is deferred until the special master or special masters hear and recommend apportionment of the settlement fund to all death claimants, and hear and recommend a settlement sum in the survivor claim, and this Court has approved or modified the same;

2. That the complainants shall forthwith submit to this Court a motion for an order appointing the special master or special masters to determine the damages;

3. And that all counsel commence forthwith the preparation of proofs of damages so as to enable the hearings before the special master or special masters to proceed as soon as the same may be convenient.

/s/ FRANK J. BATTISTI
Chief Judge

OPINION OF DISTRICT COURT

(Filed January 22, 1973)

Civil No. C-67-61

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In the Matter of the Complaint of CAMBRIA STEAMSHIP COMPANY, a corporation, as owner, and Bethlehem Steel Corporation, as Demise Charter in Possession and Operation of the STEAMER DANIEL J. MORRELL, Her Engines, etc. for Exoneration From or Limitation of Liability.

MEMORANDUM OPINION

BATTISTI, *Chief Judge*:

The estate of Arthur I. Crawley, deceased, objects to the Report of The Special Masters in its disallowance of the claim for loss of prospective inheritance and in the alleged inadequacy of the award for pain and suffering. The second claim is rejected. The first claim raises a more important issue and is deserving of analysis. This question is whether sole surviving next of kin who are the deceased's brothers and sisters and their children may receive the rights to succession which would have gone to the deceased parents had they been alive, in the absence of a surviving widow or children. Phrased differently, are the surviving brothers and sisters to be completely barred from recovering compensatory damages for the pecuniary loss of their prospective inheritance from the decedent.

In order to properly determine this claim the effect of *Moragne v. States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) must be examined. The court adopts the report of the Masters on this question and it is incorporated herein.

III. MORAGNE V. STATES MARINE LINES, INC.

Subsequent to the commencement of this litigation, but prior to the settlement agreement, the United States Supreme Court decided the case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). That decision recognized for the first time the existence of a "common law" action at admiralty for wrongful death. It applied this right of recovery to liability based upon the theory of unseaworthiness. In an Order dated April 2, 1972, we invited arguments and briefs from all the parties as to the applicability of the *Moragne* decision to these proceedings and its effect, if any.

The threshold question is whether *Moragne* is applicable at all in these proceedings. We have carefully examined all of the pleadings filed in this cause; and in particular, the Answers filed by the respective claimants. Without exception, each of the claimants seeks to recover (among other grounds) upon the theory of unseaworthiness. Further, in every other significant respect, each of the claims before the Special Masters is sufficiently broad to encompass a claim under the *Moragne* decision. Thus, the issues raised by the pleadings include liability based upon the *Moragne* decision.

In addition, the *Moragne* case was decided by the Supreme Court several months before the settlement agreement in this case was made. Thus, *Moragne,* together with any expansion of admiralty damages which it provides,

was law at the time this case was settled. In a similar situation, the Court of Appeals has applied the *Moragne* decision to a case which was on appeal when *Moragne* was decided. See *U. S. Steel Corp. v. Lamp,* 436 F.2d 1256 (6th Cir., 1970).

The Order of Reference does not specify what theory of liability or measure of damage we are to apply in apportioning the settlement fund. The Order of Reference generally empowers the Special Masters to recommend an apportionment of the settlement fund on the basis of any statutory or case law applicable to the facts and issues of this case.

In view of the fact that both the pleadings and the Order of Reference encompass a consideration of *Moragne*-type claims, we have concluded that it would be error for us to refuse to consider such claims.

Having determined that we must consider *Moragne* claims in apportioning the settlement fund, we must next ascertain the proper measure of damages and class of beneficiaries entitled to recover under such claims. The Supreme Court expressly left these questions open in the *Moragne* decision. 398 U.S. at 406, 90 S.Ct. 1772. The Court decided to await the development of decisional law through the lower courts before speaking on this question itself.

The questions inherent in the *Moragne* decision have presented us with probably our most difficult problem. The Supreme Court in *Moragne* directed that the federal courts recognize a "common law" action for wrongful death at admiralty. In doing so it rejected the century-old rule of *The Harrisburg,* 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), that no common-law action for wrongful death existed at admiralty. With the exception of the few federal

cases that recognized an action for wrongful death *prior* to *The Harrisburg* and the handful of cases which have sought to interpret *Moragne*, we are without any federal case-law authority to assist us in answering the difficult problems before us.

Furthermore, the rule which was applied in *The Harrisburg* was also the Common Law of England for hundreds of years. The Common Law recognized no right of recovery for wrongful death. 3 *Holdsworth, History of English Law*, 676-677 (3rd Ed., 1927). The reason given for the rule was the so-called felony-merger doctrine. By virtue of this doctrine, the Common Law did not allow any civil recovery for an act that constituted both a tort and a felony. It was said that the tort was merged into or was pre-empted by the felony. See e.g., *Higgins v. Butcher*, Yel. 89, 80 English Reports 61 (K.B. 1606). Originally this rule had some practical justification. The punishment for a felony in England was death for the felon and the forfeiture of his property to the Crown. Thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. And, since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death. *Moragne v. States Marine Lines, supra*, 398 U.S. at 382, 90 S.Ct. 1772.

Although this practical justification never existed in the United States, the American courts generally adopted the English rule as the common law of this country. *Moragne v. States Marine Lines, supra*, 398 U.S. at 384, 90 S.Ct. 1772. Eventually the incongruity of allowing a recovery for injury but not for death led Parliament to enact Lord Campbell's Act (9 & 10 Vict., C 93 Sect. 1-6, 1846), and has also moved virtually every state legislature to enact a statute allowing a recovery for wrongful death.

This history is significant to our problem in that it explains the virtual absence of any case law allowing recovery for wrongful death in the absence of statute. Indeed, except for *Moragne*, the few decisions which preceded *The Harrisburg*, and some cases in Scotland, virtually no case recognizes a "common law" action for wrongful death. Thus, there is little if any authority to which we may resort in seeking to ascertain the proper measure of damages and class of beneficiaries who can recover upon such a claim.

The *Moragne*-type claim derives from "common law" as opposed to "statute" law. It is a creation of the courts rather than the legislature. Normally in such a situation, we would look to the case law to answer questions concerning the application of such a claim. But in this case there is none, or almost none. The common law has not traditionally recognized any action for wrongful death in the absence of statute; thus, there are no cases which would describe either the measure of damages in a common-law action for wrongful death or the class of beneficiaries who are entitled to recover.

The Supreme Court, recognizing this problem, indicated that the lower courts could find "persuasive analogy for guidance" in the Death on the High Seas Act and the numerous state wrongful-death acts. *Moragne v. States Marine Lines, supra*, 398 U.S. at 408, 90 S.Ct. 1772. These, however, are not uniform. Indeed, they are somewhat diverse. See, "Wrongful Death Damages in North Carolina," 44 *North Carolina Law Review* 402 (1966). How is the choice to be made among such disparate provisions, all of which are of equal status; and how are the standards applicable to *Moragne* claims to be accommodated to the existing statutory scheme represented in the Jones Act and the Death on the High Seas Act?

The Supreme Court has provided some guidance as to the latter question. The Court stated that no accommodation was necessary. Congress never intended that either of the two statutes pre-empt any portion of the field of admiralty damages. Many cases previously recognized a concurrent application of the Jones Act and the Death on the High Seas Act. See, "Annotation—Death on the High Seas Act: Right to Recovery for Death of Seamen as Affected by the Jones Act," 22 A.L.R.3rd 852. Thus, the determinations of the measure of damages and class of beneficiaries entitled to recovery under a *Moragne* claim must not rest solely upon their consistency with the Jones Act and the Death on the High Seas Act provisions.

On the other hand, we cannot disregard these two federal statutes altogether in determining the measure of damages and class of beneficiaries in *Moragne*-type claims. We must consider these generally along with the various state wrongful-death statutes in seeking to resolve these two issues. *Moragne v. States Marine Lines, supra,* 398 U.S. at 408, 90 S.Ct. 1772.

How are we to choose from among the standards set forth in the various state and federal wrongful-death statutes? The statutes themselves are varied; they are inconsistent; they are all of equal authority. See 44 *North Carolina Law Review, supra,* at 402. We have been able to glean three basic guidelines from the *Moragne* decision itself:

1) The determination should not be tailored to accommodate the operation of the federal wrongful-death statutes. (See above)

2) The standards that are adopted must be uniform in application to all cases decided under admiralty jurisdiction. *Moragne v. States Marine Lines, supra,* 398 U.S.

at 396, 401, 90 S.Ct. 1772; see also *U. S. Steel v. Lamp*, 436 F.2d 1256 (6th Cir., 1970).

3) We must look to congressional and legislative policy, as reflected in existing wrongful-death statutes, as articulating generally-accepted objects of concern to our society and generally-accepted methods of protecting those objects of concern. *Moragne v. States Marine Lines, supra*, 398 U.S. at 408, 90 S.Ct. 1772.

These guidelines require us to reject those cases applying *Moragne* which have utilized only the state wrongful-death statute applicable to the place of injury. See, e. g., *Spiller v. Thomas M. Lowe and Associates, Inc.*, D.C., 328 F.Supp. 54 (1971). Indeed, where recovery is available under *Moragne*, recovery under a state wrongful-death statute is precluded. *U. S. Steel v. Lamp*, 436 F.2d 1256 at 1279 (6th Cir., 1970); *Dennis v. Central Gulf Steamship Corp.*, 323 F.Supp. 943 (E.D. La. 1971), affirmed 453 F.2d 137 (5th Cir., 1972); *Petition of Canal Barge Company*, 323 F.Supp. 805 (N.D.Miss., 1971); see "Admiralty—The Proper Measure of Recovery under the Newly-Created General Maritime Law for Wrongful Death," 25 *Ark.Law Rev.* 512 (1972).

The real question is: how are we to weigh the various state and federal wrongful-death statutes in determining the proper measure of damages and class of beneficiaries in *Moragne* claims. This question is best answered by an articulation of the reason for referring to these statutes in the first place. The Supreme Court, in recognizing the existence of the *Moragne*-type claim, considered the various wrongful-death statutes as the expression of a general public policy and societal concern:

> "These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no pres-

ent public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of a policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." 398 U.S. at 390-391, 90 S.Ct. at 1782.

A little later the Court said:

"This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, 'much of what is ordinarily regarded as "common law" finds its source in legislative enactment.' Landis, *supra*, at 214. It has always been the duty of the common law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principles —many of them deriving from earlier legislative exertions." 398 U.S. at 392, 90 S.Ct. at 1783.

We must, therefore, consider various state and federal wrongful-death statutes as the expression of a societal policy of concern for a given class of individuals and as a desire to provide them with a certain measure of protection. Thus, we must examine these various statutes and determine whether we can detect a general policy of concern for certain individuals, as opposed to others, and a general desire to provide one measure of protection as opposed to another.

Let us consider first the question of what beneficiaries are generally given a right to recover. The most comprehensive summary of wrongful-death statutes is found in 44 *North Carolina Law Review* 402, an article entitled "Wrongful Death Damages in North Carolina." As the article indicates, twenty-seven statutes provide for exclusive classes of beneficiaries, limiting recovery to these. Six states utilize the laws of intestate succession to determine beneficiaries, and four others allow recovery to the decedent's heirs." One statute specifies that the estate of the deceased is to receive the recovery. Forty-one jurisdictions expressly provide for recovery by the surviving spouse, and twenty-seven expressly provide for recovery by the surviving spouse and any children. Fourteen statutes makes this an exclusive class. Nine statutes allow recovery by the parents. Only three statutes permit recovery by non-dependent relatives. The Jones Act permits recovery by the wife and children of the deceased, and if none, then the parents of the deceased, and if none in either case, then by the dependent relatives of the deceased. The Death on the High Seas Act permits recovery by all three of these classes concurrently.

While we look to the pattern of these state and federal wrongful-death statutes to provide a guideline for our determination, we must not make that determination based upon numbers alone. Other considerations are also important, and indeed, their importance has been demonstrated in the cases before us. The various statutes must be considered in terms of their applicability to maritime problems, their logic and internal consistency, and the degree to which they represent generally-accepted norms and values.

After examining these various laws, we have concluded that the federal wrongful-death statutes must be weighed

heavily in our determination. We reach this conclusion for several reasons. First of all, they were enacted by a legislature representing all people in all sections of the nation. These statutes represent, perhaps more broadly, the feeling of our society upon these various problems. Second, they were enacted specifically to deal with maritime subjects. Third, their similarity and longevity indicate a strong, well-established, congressional policy on these matters. Fourth, the classes of beneficiaries specified in the federal statutes are more consistent with the measure of damages which they utilize, i. e., pecuniary loss to the beneficiaries, than are some of the state statutes. For example, a statute which measures damage by pecuniary loss, yet excludes from recovery a dependent parent of the deceased, suffers from an obvious internal inconsistency. The parent has suffered a pecuniary loss, yet he is barred from relief. The federal statutes on the other hand allow recovery for *all* pecuniary losses, at least for those relatives who are actually dependent to a greater or lesser degree.

Furthermore, the classes of beneficiaries defined in the federal statutes appear to be very realistic in application, particularly to the situation of seamen. The nature of their occupation requires that seamen be absent from their homes for a considerable period of time. Indeed, many of them have no home except for the ship. Thus, many seamen never marry. At the same time, as we have seen in the claims before us, they use their earnings to assist their parents or other members of their family. Thus, in the particular case of seamen, parents and dependent relatives are commonly beneficiaries and should not be excluded from recovery. Indeed, to restrict recovery to the wife or children of the decedent would be to exclude large numbers of beneficiaries who are truly dependent upon

the deceased and who suffer a pecuniary loss by his death, sometimes, in fact, a more substantial loss than would be suffered by the decedent's wife or children. Thus, the several state wrongful-death statutes that restrict recovery to the decedent's wife and children appear to have adopted a viewpoint that does not adequately cover all those persons who may suffer an actual pecuniary loss.

The federal statutes exclude non-dependent relatives. That exclusion is reflected in all of the state wrongful-death statutes (with three exceptions). This consistent exclusion appears to represent a generally-accepted value judgment that the interest of non-dependent relatives is not of such concern as compared to dependent relatives. Thus, the various wrongful-death statutes have, almost without exception, failed to protect the interest of non-dependent relatives.

The situation of non-dependent relatives is clearly presented in three of the cases before us. Captain Crawley, Master of the *Morrell*, was unmarried. He is survived by several brothers and sisters and their children, none of whom claim to have been dependent upon him. On the other hand, Captain Crawley had a substantial income and placed a large portion of this income into savings each year. It is likely that if he had survived to a normal retirement age, he would have left substantial estate to these relatives.

Henry Rischmiller was in a similar situation. He was unmarried and is survived by his brother, who was not dependent upon him in any way. On the other hand, Mr. Rischmiller saved a substantial portion of his earnings, and it is likely that if he had lived to a normal age, he would have left a considerable estate to his brother.

A somewhat different situation is presented by the case of Nicholas Homich. Mr. Homich is survived by some relatives who actually depended upon him for a portion of their normal living expenses, but he is also survived by several others to whom he made frequent gifts. We have determined that in most situations the relatives receiving these gifts were not "dependent" upon them, but rather accepted them merely as expressions of affection.

We have concluded that there can be no recovery under a *Moragne*-type claim for non-dependent relatives. Such a recovery would contravene the long and well-established congressional policy in this area and would be inconsistent with the expression represented in the vast majority of state wrongful-death statutes, which prohibit such a recovery. In addition, any recovery by non-dependent relatives is, by its very nature, speculative. Such a recovery would of necessity be based upon a prediction of the future intentions and family relationships of the deceased. A non-dependent relative's recovery would of necessity be based solely upon his prediction that the deceased would have made un-solicited gifts to him in the future, regardless of his need, or would have designated him as a beneficiary of his estate. And it would also be based upon the prediction that the deceased would not have expended his savings for his own benefit during his lifetime. At the very best, such predictions involve speculative prognostications of a much more unreliable and chance character than those required in dependency claims, where there will usually be an established need of support or a legal obligation.

We see the various federal and state wrongful death statutes as expressing a societal decision that the interest of non-dependent relatives is not so substantial as to require protection. The non-dependent relative is, by defini-

tion, independent of any contributions from the deceased. Anything which he would receive at the time of the deceased's natural death, or by way of gifts during his lifetime, or by way of judgment in the event of the deceased's unnatural death, is a happy windfall. That situation is to be distinguished from the situation of a dependent relative, who suffers a real change in his living standard by reason of the deceased's death and who must look to the law for protection. Indeed, in many cases recovery of damages for the wrongful-death may be the dependent relative's only means to avoid becoming a public charge.

We have determined that the class of beneficiaries defined by the Death on the High Seas Act provides the most appropriate, generally-accepted, and logically-consistent class of beneficiaries for maritime wrongful death claims. We have determined to utilize that definition in deciding all *Moragne*-type claims asserted in this litigation. Several other courts have utilized the same standard, although for different reasons. *Green v. Ross,* 338 F.Supp. 365 (S.D. Fla., 1972); *Guilbeau v. Calzada,* 240 So.2d 104 (La.App., 1970).

We have also determined that the "pecuniary loss" standard, provided in both the Jones Act and the Death on the High Seas Act, is the measure of damages which we must utilize in *Moragne*-type claims. Forty-three jurisdictions utilize loss to survivors as the measure of damages in their wrongful-death statutes. Seven utilize the loss to the estate as the measure of damages. Two utilize a combination of both standards. Two measure damages by the culpability of the decedent, and one measures damages by loss to the decedent himself.

The prevalent measure of damages in the United States is the loss-to-beneficiary test. Indeed, this test seems to reflect the basic concern of wrongful death statutes gen-

erally, i. e., the protection of those who suffer or are damaged by reason of the death.

Of the states that measure damages by the loss to survivors, twelve allow damages based upon the amount of actual past contributions of the decedent, together with the value of any services he rendered to the beneficiary. Seventeen states add loss of love and affection to the above items. Eight states allow recovery for the beneficiary's grief and mental anguish, in addition to the above items.

Since the vast majority of wrongful-death statutes allow recovery for pecuniary loss based upon actual cash contributions of the decedent, together with the services which he rendered to the beneficiary, there is little question but that these items must be allowed as elements of damage under *Moragne*. A more difficult question, however, is whether damages should be limited to those of a pecuniary nature, or expanded to include the loss of the decedent's love and affection and the survivor's grief and mental anguish. A majority of the states permit such recovery, and indeed, at least one federal case has also allowed it under *Moragne*. See: *In the Matter of Sincere Navigation Corporation*, 329 F.Supp. 652 (E.D.La., 1971).

We believe that these latter elements of damage are not recoverable under *Moragne*.[1] We have so concluded for several reasons. First of all, the federal rule allowing recovery only for pecuniary loss is of long-standing and is well-established. Early interpretations of both the Jones Act and the Death on the High Seas Act, not to mention the Federal Employers' Liability Act, all limited those

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1. This ruling is supported by several recent decisions applying *Moragne*: *Mascuilli v. United State*, 343 F.Supp. 439 (E.D.Pa., 1972); *Petition of Canal Barge Company*, 323 F.Supp. 805 (N.D.Miss., 1971); *Green v. Ross*, 338 F.Supp. 365 (S.D.Fla., 1972).

statutes to pecuniary-type damages. And, during the many years that these statutes have been in force, Congress has not seen fit to amend them to include additional elements of damage. This long history seems to represent a strong, or at least consistent, federal policy in favor of pecuniary-type damages as opposed to the other, more speculative, elements.

In addition, this federal policy is derived from an interpretation of three statutes that allow recovery for a beneficiary's "damages." The Jones Act, the Death on the High Seas Act, and the Federal Employer's Liability Act do not use the term "pecuniary loss." Rather, they use the term "damages." Recovery is allowed for any "damages" suffered by the beneficiary due to the decedent's death. It is the courts that have interpreted the term "damages" to mean only damages of a pecuniary nature. This interpretation is significant, because in those statutes which allow recovery for items such as love and affection and grief and mental anguish, these elements of damage are often specifically mentioned as being recoverable.

We must weigh the long-standing federal policy in this area more heavily than the various state statutes which have allowed a recovery for loss of love and affection and grief and mental anguish. To hold otherwise would be to disregard the need for uniformity which is expressly sought in the *Moragne* decision. Indeed, the one case which has allowed recovery of the questionable items has acknowledged this difficulty. See, *In re Sincere Navigation Corporation, supra,* 329 F.Supp. at 657. We, therefore, hold that the measure of damages specified in the Jones Act and the Death on the High Seas Act is applicable to claims made under the *Moragne* decision.[2]

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2. We express no opinion on the recoverability of funeral expenses. No claim has sought recovery for such expenses.

The claimant contends that the result reached by the Co-Masters in this cause is contra to the decision of this court in *Marsh, Admx. v. Buckeye Steamship*, 330 F.Supp. 972 (N.D.Ohio 1971). In that case it was noted that the courts could fashion a general maritime rule in actions for wrongful death. The approach taken by the Masters and adopted by this court are not in conflict with the decision in Marsh. Therefore the objections of this claimant are overruled.

It is so ordered.

OPINION OF THE COURT OF APPEALS

(Decided and Filed October 30, 1974)

No. 73-1349-1350

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the matter of the complaint of Cambria Steamship Co., a corporation, as owner and Bethlehem Steel Corporation as demise Charterer in possession and operator of the Steamer Daniel J. Morrell, her engines, etc., for exoneration from or limitation of liability.

Claim of FREDERICK W. RISCHMILLER, Administrator of the Estate of Henry Rischmiller,
Appellant,

v.

DOROTHY M. DAHL, Widow, Administratrix of the Estate of George M. Dahl, deceased,
Appellee 73-1349

Claim of CHESTER E. GORDON, Administrator of the Estate of Arthur I. Crawley, deceased,
Appellant,

v.

DOROTHY M. DAHL, Widow, Administratrix of the Estate of George M. Dahl, deceased,
Appellee 73-1350

Before: WEICK, LIVELY and ENGEL, *Circuit Judges.*
ENGEL, *Circuit Judge.*

In *Moragne v. States Marine Lines,* 398 U.S. 375 (1970), the Supreme Court overruled *The Harrisburg,* 119 U.S. 199

(1886) to create for the first time a non-statutory cause of action for wrongful death based upon unseaworthiness.[1] *Moragne* deliberately left the the shaping of the new action to "further sifting through the lower courts in future litigation." 398 U.S. at 408. Specifically, the Court in *Moragne* left unanswered the question of who were to be the beneficiaries of the newly created maritime right and what elements of damages were to be recoverable, but suggested that the court would not be without "persuasive analogy" in the general maritime law as well as state and federal wrongful death acts, as they endeavored to resolve the "subsidiary issues" left open by *Moragne*. We consider two of those issues in these consolidated appeals.

In the appeal of Rischmiller, we consider whether an adult and non-dependent brother, as sole surviving next of kin, can maintain a *Moragne* action to recover damages for his loss of prospective inheritance.

In the appeal of Crawley's Estate, as represented by appellant Gordon, administrator of that estate, we consider whether the wrongful death action created by *Moragne* should be an action for "loss to the estate" of the deceased, measured by the amount the deceased would have accumu-

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1. *The Harrisburg*, 119 U.S. 199 (1886), held that the common law of admiralty, recognized no cause of action for wrongful death. The court in *Moragne* recognized that the doctrine applied in *The Harrisburg* was based upon an antiquated English doctrine of felony merger, which the court found to be no longer viable in this century. According to the felony merger doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. Since all intentional or negligent homicide was felonious, and conviction brought forfeiture of the felon's estate there could be no civil suit for wrongful death. See *Moragne v. States Marine Lines*, 398 U.S. 375, at 382. In creating the new cause of action, the Supreme Court recognized that wrongful death statutes had been enacted in every state in the union, and that such a remedy was provided by several federal statutes. For an excellent discussion of the development of wrongful death remedies in this country and in England, see *Moragne, supra*, at 381-388.

lated out of his earnings during the period by which his life expectancy was shortened, and recoverable irrespective of whether the decedent is survived by next of kin or other beneficiaries.

The district court below disallowed both Gordon's and Rischmiller's claims. *In re Cambria Steamship Company*, 353 F.Supp. 691 (1973). We affirm.

On November 29, 1966, the S.S. Daniel J. Morrell, a Great Lakes bulk cargo carrier, broke in two and sank in Lake Huron within the coastal waters of the State of Michigan. Among the twenty-eight men who perished in the disaster were Arthur I. Crawley, Captain of the Morrell, and Henry Rischmiller, a crew member.

Following the loss, the owners of the ship brought an action for exoneration or limitation of liability in the United States District Court for the Northern District of Ohio. After notice, interested claimants filed answers to the complaint alleging that the ship was unseaworthy and also filed individual claims for recovery. The case was eventually settled as to liability and the vessel owners paid into the registry of the court the agreed sum of $2,750,000, out of which all claims were to be paid. Among the claimants were appellant Frederick I. Rischmiller who made claim for the wrongful death of his brother Henry, and appellant Chester E. Gordon, who, as administrator of the estate of the deceased Captain Crawley, filed a claim on behalf of the latter's estate.

To determine the validity and amount of the several claims, the district court appointed two special masters who thereafter reported their findings to the court, which entered final judgment on February 3, 1973. The judgment included determinations that neither the brother of Rischmiller, nor the administrator of Captain Crawley's estate

was entitled to recover damages representing loss of prospective inheritance, or loss to the estate itself.[2]

Henry Rischmiller was a wheelsman aboard the Morrell. At the time of his death he was 34 years old, unmarried, and earned over $7,000 per year. He left surviving him only his brother Frederick who was admittedly self-supporting and independent. Frederick filed his claim in the district court action for loss of inheritance caused by the untimely death of his brother. The masters found that it was likely that Henry would have continued working until age 65 at the latest, and would have accumulated substantial savings in the meantime. They further found that Frederick Rischmiller would probably have survived Henry and been his sole heir, and that the present value of the additions to Henry's estate which would ultimately have been inherited by Frederick but for the wrongful death was $48,667.67. The Rischmiller claim was therefore put at that sum, but was disallowed by the masters and the trial judge because Frederick was a non-dependent collateral relative.

Arthur I. Crawley was Captain of the Morrell. No claim was established that his conduct in any way contributed to the unseaworthiness or loss of the vessel. Forty-seven years of age at the time of his death, Crawley had never married and he was survived by two brothers and four sisters, all of whom were older than he. One brother died after Crawley's death, leaving children, but none of the brothers or sisters, or their children, were in any way dependent upon Arthur. Captain Crawley's in-

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2. Claims were assessed and allowed, however, to all claimants, representing damages for pain and suffering, of the decedent, in the amount of $7,500. Since the total of all claims allowed exceeded the fund, this amount, as well as others, was reduced proportionately.

come far exceeded his expenses and, in the ten years prior to his death, his savings had averaged 34.9 per cent of his income. Appellant Chester E. Gordon was appointed administrator of Captain Crawley's intestate estate and made claim in the district court on the theory of a "loss of estate" due to the wrongful death. The special masters computed such loss, as reduced to present value, at $239,189.59. This last sum, however, they disallowed for the reasons stated in disallowance of the Rischmiller claim, and because Captain Crawley, as the youngest in his family, would probably have outlived his brothers and sisters, making the likelihood that they or the children would, in fact, have inherited his estate even more speculative.

While the two appeals proceed upon somewhat different theories, the ultimate recipients of any damages in both would be non-dependent collateral relatives, and the amount recovered would be measured by a reduction to present value of the amount of any accumulation of earnings which would have been added to decedent's estate had he lived out his normal life expectancy.[3]

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3. In SPEISER, RECOVERY FOR WRONGFUL DEATH (1966), at 182, the difference between these two theories is described:

> The difference between recovery by decedent's next of kin for loss of inheritance under the loss to survivors type death statute, and recovery for loss of inheritance under statutes which measure damages by loss to the estate, was described as follows by McCormick: "This [element of damage] is closely reminiscent of the 'loss to the estate' basis of recovery, but is different in that the claim here is founded not only on the probability of accumulation by the deceased, but is also conditioned on the probability that he would have left it, by will or inheritance, to the statutory beneficiaries."

We note that we are not asked to determine here who is the proper party to bring a wrongful death action under the general maritime law. But see *Futch v. Midland Enterprises, Inc.*, 471 F. 2d 1195 (5th Cir. 1973), where it was held that the action must be brought by the personal representative of the decedent.

Appellant Rischmiller urges us to apply the state law of Michigan[4] because the Morrell sank in its waters. Appellees urge that we simply borrow the schedule of beneficiaries from the Death on the High Seas Act.[5] We reject both approaches. The decisions following *Moragne*, while following the mandate of that case to seek guidance from state and federal statutes, have endeavored generally to develop a uniform body of federal law, neither borrowing automatically from federal statutory provisions, nor applying any particular state law,[6]

In *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), the Supreme Court more specifically defined the nature

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4. M.C.L.A. § 600.2922. We doubt in any event that application of Michigan law would have resulted in recovery for these appellants. While non-dependents have been permitted to recover for loss of society in Michigan, *Smith v. City of Detroit*, 388 Mich. 637, 202 N.W. 2d 300 (1972), indicating that dependency may not be an absolute requirement, the Michigan Supreme Court has also held that the loss of prospective inheritance is not a proper element of damages under the Michigan Act. *Baker v. Slack*, 319 Mich. 703, 30 N.W. 2d 403 (1948). We need not consider whether *Baker v. Slack* would be applied in Michigan today were the question to arise since we conclude that neither the law of Michigan nor that of any state is controlling.

5. 46 U.S.C. § 761, which provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shores of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation, which would have been liable if death had not ensued.

6. See, e.g., *Spiller v. Lowe & Associates*, 466 F. 2d 903 (8th Cir. 1972) [step-child a proper beneficiary under wrongful death action]; *Greene v. Vantage Steamship Corp.*, 466 F. 2d 159 (4th Cir. 1972) [funeral expenses and pain and suffering of deceased recoverable]; *Futch v. Midland Enterprises, Inc.*, 471 F. 2d 1195 (5th Cir. 1973) [personal representative is proper plaintiff in action for wrongful death]; *Petition of M/V Elaine Jones*, 480 F. 2d 11 (5th Cir. 1973) [damages for grief not recoverable].

of the action created by *Moragne*. It first addressed itself to the question of whether a *Moragne* action could be maintained by a widow, although her husband before his death had already recovered damages for his injuries sustained aboard petitioner's vessel. While recognizing that "a majority of the courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime", 414 U.S. at 579, Mr. Justice Brennan, speaking for a majority of the Supreme Court, ruled that *Moragne* created a wholly new uniform and non-statutory federal cause of action for maritime death. Seeking guidance from existing federal and state statutory law, but conceiving itself bound by neither, the Supreme Court ruled that the cause of action thus created was independent of and in addition to any action which the decedent may have had for his personal injuries, and was thus not barred by the pre-death recovery of the decedent.

A majority of the Court in *Gaudet, supra,* also held that the new cause of action permitted recovery by the dependents of the deceased for loss of support, services and society as well as damages for funeral expenses, but not for grief. In permitting damages for loss of society, the Court provided relief that is generally not available under the Death on the High Seas Act.[7] While noting that a majority of the states recognize loss of society,[8] the Court ultimately based its ruling on the character of the maritime law itself.

"But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian

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7. It has generally been held that recovery for loss of companionship and society is not permitted under the Death on the High Seas Act. *First National Bank in Greenwich v. National Airlines, Inc.*, 238 F. 2d 621 (2nd Cir. 1961).

8. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 587, and note 21.

policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." 414 U.S. at 588

In our approach to the issues in this case, we believe we should be guided by those general principles which are set forth in *Sea-Land Services v. Gaudet, supra,* as defining the nature of the action and remedy created by *Moragne.*

LOSS TO ESTATE

Recognizing the unique opportunity which rests in the courts to fashion new rights and remedies under *Moragne,* counsel for Captain Crawley's estate urges that we adopt a rule obtaining by statute in a minority of the states which provides a right of recovery for loss of the estate itself, apart from whether there exist any surviving next of kin.[9]

The fundamental difference between loss to survivor statutes and loss to estate statutes is that:

> "Whereas most loss to survivors statutes will permit either no recovery at all or only a small measure of nominal damages, or special damages such as medical or funeral expenses, in cases where decedent is not survived by any statutory beneficiary, most loss to the the estate statutes permit the action to be maintained and allow recovery of the full measure of the loss to the estate notwithstanding the fact that decedent is survived by no next of kin or statutory beneficiary." SPEISER, RECOVERY FOR WRONGFUL DEATH (1966), at p. 251.

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9. See SPEISER, RECOVERY FOR WRONGFUL DEATH (1966), § 3.2, where the author indicates that several states measure damages solely by loss to the estate, while a few others, e.g., Florida, provide that a claim for estate loss may be made where there are no surviving statutory beneficiaries.

This argument is particularly necessary to the claim of the Crawley estate since no brother or sister would probably have survived Captain Crawley, he being the youngest, and we recognize some merit in it. Such an approach in essence measures the net value of the life which was wrongfully taken, and in measuring the responsibility of the tortfeasor thereby, provides a simpler means of computing damages. It also avoids what is claimed to be an unconscionable result where a valuable life is taken, but there exists no obligation on the part of the tortfeasor to pay for it because no survivor could make claim for the loss of it.

We reject this view, however, because it has commended itself to so few other jurisdictions, and because its fundamentally punitive approach is inconsistent with the expressed compensatory philosophy of the maritime law.

As concepts of compensation for humanitarian purposes have grown, and with them an erosion of the barriers to recovery based on fault concepts,[10] we believe the courts have as well moved away from ideas that damages ought to be punitive rather than compensatory.[11]

None of the federal wrongful death statutes premises recovery on losses sustained by the estate, but each provides a specified list of beneficiaries for whose benefit the

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10. See, e.g. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), where the Supreme Court held that a shipowner's duty to provide a seaworthy ship is absolute, and not satisfied by due diligence.

11. In an admiralty action it has been held that an individual claimant may not recover punitive damages absent a showing of gross negligence, actual malice or criminal indifference. Thus, where the action is predicated upon unseaworthiness alone, punitive damages are not recoverable. See *In Re Marine Sulphur Queen*, 460 F. 2d 89 (2nd Cir. 1972), *cert. denied* 409 U.S. 982 (1972).

action is to be brought.[12] The Supreme Court itself recognized, in reliance upon *Speiser, supra,* and other sources, that 44 states and territories measure damages by losses sustained by beneficiaries.[13]

While a few of those jurisdictions measuring damages by loss to beneficiaries permit an action on behalf of the estate where the decedent is not survived by any statutory beneficiaries, and a few other as noted earlier, measure all losses by loss to the estate, the majority do not provide for this type of recovery.[14] Thus, while appellant is not without some authority for the position urged, we hold the better rule to be that the action exists *primarily* for the benefit of individual beneficiaries, and general losses to the estate are not recoverable. *Moragne* and *Sea-Land Services v. Gaudet* speak consistently in terms of dependents:

> "In overruling *The Harrisburg Moragne* ended these anomalies by the creation of a uniform federal cause of action for maritime wrongful-death victims admiralty's 'special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages.' *Moragne,* supra, at 387. Our approach to the resolution of the issue before us must necessarily be consistent with the extension of this

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12. See 42 U.S.C. § 761; (text provided in note 4, *supra*). See also 42 U.S.C. § 688 (Jones Act) which incorporates by reference the recovery provisions of the Federal Employers Liability Act, 45 U.S.C. § 51, which provides in pertinent part:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . or in case of the death of such employee, to his or her personal repreesntative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee . . .

13. 414 U.S. at 587, n. 21.

14. See SPEISER, *supra,* at 63-66.

'special solicitude' to the dependents of the seafaring decedent."

Sea-Land Services v. Gaudet, 414 U.S. at 577

In our review, the liberal and humanitarian character of martitime proceedings as expressed in *Moragne* and *Gaudet, supra,* contemplates solicitude for dependents, not inanimate estates. In so holding, we do not rule that certain specialized losses such as funeral expenses may not nonetheless be recovered by the estate, as is the case in several states premising primarily recovery on a beneficiary rather than an estate theory.[15]

NON-DEPENDENT BROTHER AS BENEFICIARY

Many of the reasons for rejecting the claim of Crawley's estate apply as well to the claim of Frederick Rischmiller.

We recognize at the outset that loss of prospective inheritance is frequently held a proper element of damages which are awarded qualified beneficiaries. Thus it is allowed under the Death on the High Seas Act, *National Airlines, Inc. v. Stiles*, 268 F. 2d 400 (5th Cir. 1959) and the Federal Employers Liability Act, see *Martin v. Atlantic Coast Line R. Co.*, 268 F. 2d 397 (5th Cir. 1959), and hence would be available under the Jones Act. See *Cleveland Tankers v. Tierney*, 169 F. 2d 622 (6th Cir. 1948).

These acts, however, specifically limit recovery to parents, children, spouse or dependent next of kin. Non-dependent collateral relatives are not included.[16]

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15. See, e.g. Illinois Revised Stats. ch. 70 § 2, where it is provided that the estate may recover up to $900 for hospitalization, medical and funeral expenses, and other administrative costs where no beneficiary survives. See also SPEISER, *supra*, at 66.

16. See Footnotes 5 and 12, *supra*.

The reason for the different treatment, we conclude, lies in the nature of the relationship existing between the claimant and the decedent. In awarding loss of inheritance to a widow, the court in *National Air Lines v. Stiles, supra,* observed:

> "It is as likely that a wife in these circumstances who did in fact inherit her husband's entire estate on his untimely death, would continue to be the natural object of his affection and beneficence if lived out his expectancy and made substantial accumulations as that he would continue to give her the kind of support the defendant admits he would continue." 268 F. 2d at 403

State law provides less guidance. In a large number of states, loss of prospective inheritance is recognized as a proper element of damages.[17] Except in "loss of estate" jurisdictions, however, there is little uniformity among the state acts.[18] We have, in fact, been shown no case in which a non-dependent collateral relative was awarded damages for his loss.

We remain unconvinced that the humanitarian principles of maritime law which led the Supreme Court in *Sea-Land Services v. Gaudet, supra,* to compensate a widow for loss of society, should lead us to hold that a non-dependent and collateral relative should recover for loss of an inheritance, based solely upon his legal relationship to

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17. *O'Toole v. United States,* 242 F. 2d 308 (3rd Cir. 1957), and cases cited in Annotation following *Martin v. Atlantic Coast Line, supra,* 91 ALR 2d 477; SPEISER, *supra,* at 182-183.

18. See generally, the Annotation following *Schwarz v. Gage,* 417 S.W. 2d 33, 31 ALR 3rd 371, 379, indicating that recovery by collateral relatives is variously limited or precluded in a number of states by dependency and pecuniary loss requirements. There is reflected no general trend in the states regarding recovery by such persons.

the deceased as next of kin. We agree with appellants that the amount of a deceased's prospective accumulations may not be too speculative to ascertain, see *O'Toole, supra,* and indeed, the special masters here experienced little difficulty in determining them upon the proofs. An even greater uncertainty, however, is whether the particular claimants would ultimately have received any benefit themselves. As the special masters observed, in discussing the likelihood that Crawley's collateral relatives would have ultimately inherited his accumulations:

> "We are asked to assume that he would have divided his estate equally among each branch of his family, that he would have given no portion of his estate to charity or to individuals outside the family, and that he would have continued saving, even though the only individuals who would have benefited from such saving would be collateral relatives. All of these assumptions may be true; or all may not be true.
>
> "These assumptions are by their very nature more speculative ones than those we are required to make in dependency claims. In dependency claims there is either a legal or moral obligation to support the dependent, and there is a history of the amount of contribution and its frequency. This pattern of established conduct forms the basis for a prediction of future conduct."

Comfort, companionship and society, recognized in *Gaudet, supra,* go to the very heart of family life, and their loss by family members is genuinely felt, thus justifying the intervention of the humanitarian maritime law. On the other hand, loss of prospective inheritance by one whose hopes of that inheritance hinge upon the fortuity of a man remaining unmarried and childless throughout

his life, is not an injury capable of comparison with the losses sought in *Gaudet*. The mere accident of blood relationship with nothing more does not itself call for that special solicitude which the maritime law holds for those injured within its jurisdiction.

Accordingly, the judgment of the district court is affirmed.

JUDGMENT ENTRY OF THE COURT OF APPEALS

(Filed October 30, 1974)

No. 73-1349, 73-1350

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the matter of the Complaint of Cambria Steamship Co., *et al.*,

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FREDERICK W. RISCHMILLER, Administrator and CHESTER E. GORDON, Administrator,
Appellants,

vs.

DOROTHY M. DAHL, Widow, Administratrix,
Appellee.

Before: WEICK, LIVELY AND ENGEL, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Appellee recover from Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court.

/s/ JOHN P. HEHMAN
Clerk